A

Alexander John Shek Kwok Bun v Rich Avenue Sdn Bhd & Anor

B HIGH COURT (KUCHING) — SUIT NO 22-09 OF 2003 III(I)
MOHAMED APANDI ALI J
14 DECEMBER 2007

C *Contract — Interpretation of contract — Freedom of contract — Court's intervention — Whether court shall intervene if the terms are absurd and unfair to one party*

D *Contract — Sale and purchase of property — Delivery of vacant possession — Water and electricity supply — Certificate of fitness for occupation — Whether certificate of fitness for occupation is a fundamental term — Whether delivery of property with water and electricity supply is fundamental*

E *Contract — Sale and purchase of property — Standard form contracts — Approach on interpretation of contract — Whether terms unreasonable — Whether terms absurd*

F The plaintiff as purchaser entered into a sale and purchase agreement dated 31 March 1997 with the defendants as vendor in respect of a property at Mukim Setul, Seremban. It is stipulated in the agreement that vacant possession of the property shall be delivered to the plaintiff within 30 months from the date of the agreement. The plaintiff refused to take vacant
G possession of the property, despite receiving the notice of delivery of vacant possession dated 14 June 1999 because the title to the property has not been transferred to him. The plaintiff contended that he was only obliged to take vacant possession after he had received the Certificate of Fitness For Occupation for the property. On the other hand, the defendants contended
H that the plaintiff was deemed to have taken delivery of vacant possession at the expiry of fourteen days from the date of the notice given by the defendants dated 14 June 1999 which was over three months before the expiration of the 30 months period. The plaintiff claimed against the defendants for inter alia, damages for late delivery and interest.

I

Held, allowing the plaintiff's claim for damages:

(1) A court will generally give the words of the contract their plain and

natural meaning even if it leads to an unreasonable result on the assumption that this is what reasonable persons in the position of a contract intended. However it has also been said that, if giving the words of a contract their ordinary meaning leads to an absurd result, they should be construed so as to avoid the absurdity.

(2) The court has a constitutional duty to ensure that the dominant party in a standard form agreement not abuse its position to the detriment of the weaker party bearing in mind we in Malaysia do not have as in England the Fair Trading Act 1977 or as in Australia the Trade Practices Act.

(3) Firstly, not being able to obtain physical possession of the property with all the usual amenities after the full payment of the purchase price do not make any business sense. Secondly, the delivery of the property with its full benefits of water and electricity supply and a certificate of fitness from the appropriate authority after the full payment of the purchase price is a fundamental term of the sale and purchase agreement. Thirdly, the plaintiff is put in a position where he could not enjoy the full benefit of the property like renting it out and yet is saddled with the financial burden of servicing his loan repayment with the financial company. Fourthly, public policy of ensuring that ordinary consumers are not burdened with such unconscionable terms in standard form contracts requires the court to be vigilant and this is one instance which the court should intervene. Fifthly, cl 21.1 – 21.3 and 22 of the agreement do not provide for any definite time frame for the defendants to obtain the water and electricity connection and certificate of fitness. The use of the phrase of 'using its best endeavors' in cl 22 of the agreement does not help the defendants and in fact provides seeds for arguments (see para 41).

(4) The fact that the plaintiff is a qualified solicitor is of no relevance in the case of a standard agreement. He had no choice but to accept the terms like other purchasers of the defendants' shophouses. The use of standard agreements in this day and age had eroded the basic principle of freedom of contract and the court is duty bound to be vigilant to ensure that consumers are not being burdened with unconscionable terms (see para 45).

[Bahasa Malaysia summary

Plaintif sebagai pembeli telah memasuki satu perjanjian jual beli bertarikh 31 Mac 1997 dengan defendan-defendan sebagai penjual berkaitan hartanah di Mukim Sentul, Seremban. Ia telah dinyatakan dalam perjanjian bahawa milikan kosong hartanah akan diserahkan kepada plaintif dalam tempoh 30 bulan daripada tarikh perjanjian. Plaintif telah menolak untuk mengambil

A milikan kosong hartanah, meskipun menerima notis penyerahan milikan kosong bertarikh 14 Jun 1999, kerana hakmilik kepada hartanah masih belum dipindahmilik kepadanya. Plaintif juga menegaskan bahawa beliau hanya bertanggungjawab untuk mengambil milikan kosong selepas beliau menerima Sijil Layak Mendududi untuk hartanah tersebut. Sebaliknya, B defendan-defendan menegaskan bahawa plaintif dianggap telah mengambil serahan milikan kosong pada luputnya empat belas hari daripada tarikh notis diberikan oleh defendan-denfendan bertarikh 14 Jun 1999, yang telah berlalu 3 bulan sebelum berakhirnya tempoh 30 bulan. Plaintif menuntut terhadap defendan-defendan antara lain, bayaran ganti rugi untuk kelewatan serahan C dan faedah.

Diputuskan, membenarkan tuntutan plaintif untuk ganti rugi:

D (1) Mahkamah secara umumnya memberikan perkataan-perkataan kontrak maksud yang jelas dan biasa walaupun ia akan membawa kepada keputusan yang tidak munasabah ke atas andaian bahawa ini adalah apa yang diniatkan seseorang munasabah pada kedudukan kontrak. Walaubagaimanapun, ia bolehlah juga dikatakan, jika memberikan E perkataan-perkataan kontrak akan maksud biasa yang membawa kepada keputusan yang tidak munasabah, ia haruslah ditafsirkan bagi mengelakkan ketidakmunasabahan.

(2) Mahkamah mempunyai kewajipan berpelembagaan bagi memastikan F pihak yang berkuasa dalam keadaan biasa perjanjian tidak menyalahgunakan kedudukannya sehingga menjejaskan pihak yang lemah sambil mengingatkan bahawa kita di Malaysia tidak seperti England yang mempunyai Fair Trading Act 1977 atau seperti Australia yang mempunyai Trade Practices Act.

G (3) Pertama, tidak berupaya mendapatkan milikan fizikal hartanah bersama kesemua kemudahan biasa selepas pembayaran penuh harga belian dari sudut perniagaan adalah tidak masuk akal. Kedua, serahan hartanah dengan bekalan sepenuhnya air dan elektrik dan sijil layak menduduki daripada pihak berkuasa yang yang sewajarnya selepas bayaran penuh H harga belian adalah terma asas perjanjian jual beli. Ketiga, plaintif telah diletakkkan dalam kedudukan yang mana beliau boleh menikmati manfaat penuh hartanah seperti memberi sewa dan masih dibebani dengan beban kewangan iaitu membayar pinjaman dengan syarikat kewangan. Keempat, polisi awam untuk memastikan bahawa pengguna I biasa tidak dibebankan dengan terma-terma yang tidak berkenaan dalam bentuk biasa kontrak memerlukan mahkamah supaya berjaga-jaga dan ini adalah satu contoh yang mana mahkamah terpaksa campur tangan. Kelima, klausa 21.1–21.3 dan 22 perjanjian tidak menyediakan sebarang ruang masa yang pasti untuk defendan-defendan

mendapatkan sambungan air dan elektrik dan sijil layak menduduki. Penggunaan frasa 'menggunakan ikhtiar-ikhtiar terbaik' dalam kl 22 Perjanjian tidak membantu defendan-defendan dan sebenarnya menyediakan benih-benih untuk penghujahan-penghujahan.

(4) Fakta bahawa plaintif adalah seorang peguamcara bertauliah adalah tidak relevan dalam kes perjanjian biasa. Beliau tidak mempunyai pilihan kecuali menerima terma-terma seperti pembeli-pembeli yang lain untuk rumah-rumah kedai defendan. Penggunaan perjanjian-perjanjian biasa pada hari ini dan masa lampau telah menghakis prinsip asas kebebasan kontrak dan mahkamah terikat dengan kewajipan berjaga-jaga bagi memastikan pengguna-pengguna tidak dibebankan dengan terma-terma yang tidak berpatutan.]

Notes

For cases on interpretation of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4412–4414.

For cases on standard form contracts, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4402–4407.

Cases referred to

Fitzgerald v Masters [1956] 95 CLR 420 (refd)

Glamour Green Sdn Bhd v Ambank Bhd & Ors & Anor Appeal [2007] 3 CLJ 413 (refd)

John Lee & Son (Graham) Ltd v Railway Executives [1949] 2 All ER 581 (refd)

Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936 (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352 (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 AMR 410 (refd)

Westpac Banking Corporation v Tanzone Pty Ltd & Ors [2000] NSWCA 25 (refd)

Legislation referred to

Fair Trading Act 1977 [UK]

Trade Practices Act [Aus]

Fabian Sigar (John Shek, Sigar, Wei Yee & Co) for the plaintiff.
Leonard Shim (Reddi & Co) for the first and second defendants.

David Wong J:

PROCEEDINGS:

[1] The plaintiff's claims as per from his statement of claim are as follows:

(1) Specific performance of a sale and purchase agreement dated 31 March

1997 of a land together with a building under Grant No 21089, Lot No 3715 Mukim Sentul, Seremban (the property) entered between the plaintiff and the defendant or damages in lieu.

(2) Interest for the delay at the rate of 12% per annum at day to day basis from 1 April 2000 till judgment and thereafter at the rate of 7% per annum until full and final settlement;

(3) Costs at solicitors and client basis.

BACKGROUND:

[2] These are set out in the statement of agreed facts which are as follows:

[3] By an agreement in writing dated 31 March 1997 executed between the plaintiff and the defendants ('the said agreement') the defendants offered to sell and the plaintiff agreed to buy all that piece or parcel of land together with a building therein and appurtenances thereof known as Lot 52 and forming part of the estate measuring approximately 2.380 sq feet held under Grant No 2108, Lot 3715 Mukim Sentul, Seremban (the said 'purchase price').

[4] The said purchase price shall be paid by the plaintiff in accordance with the Second Schedule of the said agreement.

No.	SCHEDULE OF PAYMENT	AMOUNT (RM)
1.	Upon signing of this Agreement	27,000.00
2.	Within fourteen (14) days from the date of the vendor's written Notice of Completion of>	27,000.00
	(a) the earthworks	40,500.00
	(b) the foundation works of the said building	40,500.00
	(c) the reinforced concrete framework of the said building	27,000.00
	(d) the walls, doors and window frames of the said building	27,000.00
	(e) the roofing of the said building	27,000.00
	(f) the electrical wiring and plumbing (without fittings) of the said building	27,000.00
	(g) the internal and external plastering of the said building	13,500.00
	(h) the roads and drains serving the said building	

3.	Upon handing over vacant possession the balance of 5% to be paid to the vendor's solicitors as stakeholder for payment to the vendor as follows:		
	(a) 2.5% at the expiry of 6 months after handling over vacant possession		
	(b) 2.5% at the expiry of 12 months after handling over vacant possession		
	TOTAL	270,000.00	

[5] Clause 4 of the said agreement stipulated that the vendor hereby undertakes that the said Property shall be free from all encumbrances created by or on behalf of the vendor immediately prior to the handing over of vacant possession of the said building to the Purchaser.

[6] Under cl 21.1 of the said agreement, it stipulates that subject to any extension or extensions of time as may be allowed by the Superintendent Officer and PROVIDED THAT the purchaser shall have paid this agreement as and when due and payable the said property without any alterations and/or additions to the said building as stipulated under cl 13 hereof shall be practically completed (as certified by the superintendent officer and be ready for delivery of vacant possession to the purchaser within thirty (30) months from the date hereof. In the event that the vendor shall delay completion of the said building and the delivery of vacant possession of the said property to the purchaser beyond the aforesaid period the vendor shall pay to the purchaser agreed damages calculated from day to day at the rate of twelve per centum (12%) per annum on the purchase price of the said property from such aforesaid date to the date of actual or deemed delivery of vacant possession of the said property to the purchaser as hereinafter provided whichever date shall be the earlier. For the purpose of this Agreement the definition of 'vacant possession' shall not include the connection of water and electricity supply to the said property.

[7] Under cl 21.2, the vendor shall exercise its best endeavours to provide and complete electricity and water supply to the said building expeditiously. The vendor shall not be responsible nor made liable to the purchaser for any delay and/or failure to connect water and electricity supplies to the said building which delay and/or failure is caused by circumstances beyond the vendor's control and jurisdiction.

[8] Under cl 21.3 upon the issuance by the Superintendent Officer of the certificate certifying that the construction of the said building has been

practically completed in accordance thereof and PROVIDED THAT the Purchaser shall have paid all monies payable under this agreement and shall have observed and performed the terms and covenants on his part herein contained to be observed and notwithstanding that electricity and water may not have been completed or supplied to the said Building the Vendor shall let the Purchaser into possession of the said Property BUT PROVIDED THAT such possession shall not give the Purchaser the right to occupy the said Property until such time as the Certificate of Fitness for Occupation is issued by the Appropriate Authorities.

[9] Upon the expiration of fourteen (14) days from the date of a notice in writing from the Vendor informing the Purchaser to take delivery of the said Property (notwithstanding that the Purchaser may not in fact take possession nor actually enter into occupation of the said Property) the Purchaser shall be deemed to have taken vacant possession of the said Property and the Vendor thereafter shall not be liable for any loss or damage to the said Property and/or to the fixtures and fittings thereon.

[10] Under Clause 22.1 of the said Agreement, it stipulates that the vendor shall do all acts and things necessary to procure the issuance of the Certificate of Fitness for Occupation in respect of the said Property and shall at its own costs and expenses comply with all the requirements of the Appropriate Authorities which shall be conditions precedent to the issuance of the Certificate of Fitness for Occupation and hereby undertakes to produce such certificate to the Purchaser when issued. For the purpose of this agreement the expression 'Certificate of Fitness For Occupation' shall mean a certificate of fitness of occupation of the said building issued by the Appropriate Authorities and shall include a temporary certificate of fitness for occupation from the Appropriate Authorities PROVIDED THAT the issuance of a temporary certificate of fitness for occupation shall not discharge the Vendor from its obligation to obtain final certificate of fitness for occupation for the said Property.

[11] The Vendor by its servant and/or agent shall be entitled at any time after the Purchaser has been let into possession of the said Property and prior to the issuance of the said Certificate of Fitness For Occupation to make any alterations and/or addition to the said building as may be required by the Appropriate Authorities and the Purchaser shall allow them access into the said Property at all reasonable times for such purposes. All other notices (if any) of the Appropriate Authorities served on or after the date of handling over of vacant possession but before the date of issuance of the Certificate of Fitness for Occupation shall be complied with by the Vendor PROVIDED the same do not relate to any alterations, additions or otherwise made by the Purchaser in contravention of Clause 11 hereto in which case and in the case

of any notice after the issuance of the Certificate of Fitness For Occupation shall be complied with by and at the expense of the Purchaser.

[12] Under clause 7.1 of the said agreement it has been stipulated that Time shall be the essence of the contract in relation to all the provisions of this agreement and in particular to the payment of any installments of the Purchase Price or any part thereof and the payment of all monies due from the Purchaser to the vendor under this agreement.

[13] The plaintiff replied to the first defendant's letter dated 14 June 1999 via a letter dated 24 June 1999 from Messrs John Shek & Company dated 24 June 1999 to inform them that since the properties have not been registered under the names of the said purchaser and that the said purchaser has not taken vacant possession of the said properties, the said purchaser will not be paying the quit rents, maintenance charges and assessment rates.

[14] After the issuance of the said letter dated 14 June 1999, the plaintiff made part payment of the outstanding amount to the first defendant in the sum of RM13,500.00 on or about the 24 June 1999.

[15] By a letter dated 27 September 1999, Messrs John Shek & Company informed the first defendant by fax that our Mr. Shek and the rest of the buyers are presently away and expected to be back on 10 October 1999 and would avert to the first defendant when they return.

[16] That the plaintiff has paid a total sum of RM256,500.00 to the vendor.

[17] That the plaintiff had on the 8th day of July 2002 written to the first defendant on the progress of the construction of the said Property.

[18] That the defendants had on the 24th July 2002 sent a copy of the Certificate of Fitness For Occupation to the plaintiff.

PLAINTIFFS CONTENTION

[19] With respect, I am not quite sure what the plaintiff wants. In his claim he asks for specific performance of the agreement or damages in lieu without stating what he actually wants. Is it for an order for the plaintiff to deliver vacant possession? It is an undisputed fact that the plaintiff could have taken physical possession of the property on the 16 May 2001, the date in which the temporary occupation certificate was issued by the relevant local council. Or is it for an order to pay for compensation for late delivery? If so, why

A didn't he take physical possession of the property on 16 May 2001? Or is the plaintiff only interested in getting compensation for damages suffered and not for the transfer of the property? If so, no evidence was adduced in court as to what damages had he suffered.

B **[20]** To compound the confusion, the plaintiff claimed for 'interest for the delay at the rate of 12% per annum at day to day basis from 1st April 2000 till judgment and thereafter at the rate of 7% per annum till full and final settlement.' Mr Sigar could not tell me where the date of 1st April 2000 comes from nor could he tell me on what amount is the 12% to be calculated C on except to state from the Bar that it should be on the sale price of the property which is RM270,000.00. Surprisingly, no attempt was made to amend the statement of claim. But be that as it may, I shall take Mr Sigar's words for it.

D **[21]** In his testimony, the plaintiff said that he refused to take possession of the property because the title to the property has not been transferred to him. But when his counsel, Mr. Sigar was questioned by me under what clause in the agreement does it say the delivery of vacant possession is conditional on the transfer of the title deed of the property in the plaintiff's name, he of E course could not give me an answer. Furthermore the plaintiff's evidences in court substantially did not relate to what was stated in the statement of claim.

[22] However, Mr Sigar in his submission tried to put the case back on track by claiming compensation pursuant to cl 21.1 of the agreement and this F is what he submitted:

> In view that the defendants have breached the said agreement pursuant to cl 21.1 therein, the plaintiff is therefore entitled to the damages as prayed. In calculating the damages, we submit that the time of breach by the defendant would be from when the plaintiff had written to the defendants for their non compliance of the G said agreement (refer to letter p 34-Exh A) and upon receipt of the plaintiff the Certificate of Fitness (COF) from the defendants dated 24 July 2002. Accordingly, the defendants were more than thirty four (34) months out of time.

[23] That amount comes to RM100,000.00.

H

[24] Mr Sigar submitted that the plaintiff is only obliged to take vacant possession only after he had received the Certificate of Fitness issued by Majlis Daerah Seremban. In the present case he contended that the date is 24 July 2002. However he did not tender any authority to the court to justify I his interpretation of the just mentioned clauses.

THE DEFENDANT'S CASE

[25] There is no confusion about the defendants' defence and it was clearly

set out by learned counsel for the defendants, Mr. Leonard Shim (Mr. Shim), in his submission. As far as the defendants are concerned they had complied with the terms of the agreement as far as delivery of vacant possession of the property to the plaintiff. This is succinctly set out by Mr Shim in para 28 of his submission and it reads as follow:

> The 30 months period provided in cl 21.1 expired on 30 September 1999. The defendants on their part have complied with the provision in cl 21.3 within the timeframe stipulated in cl 21.1. In short, the defendants have taken all necessary steps to effect delivery of vacant possession within the 30 months period. The plaintiff on their part must take delivery of vacant possession of the subject Property which the plaintiff has failed to do so. As the plaintiff refused to take delivery of vacant possession after receiving the said notice of delivery of vacant possession dated 14 June 1999 and the Architect Certificate dated 10 June 1999, I humbly submit that the plaintiff is deemed to have taken delivery of vacant possession at the expiry of fourteen days from the date of the notice given by the defendants dated 14 June 1999 which was over 3 months before the expiration of the 30 months period.

[26] Furthermore there is no provision in the agreement which state that the delivery of vacant possession is to coincide with the issuance of the Certificate of Fitness of Occupation (CFO). To support his submission, Mr Shim relied on the case of*South East Asia Brickworks Sdn Bhd v Maria Antonette* [1979] 1 ML J 46. The facts there were these. By a standard form of agreement the appellants (housing developers) sold one of the houses to the respondent. When the house was ready for occupation the respondent refused to accept the keys on the ground that no certificate of fitness for occupation had been issued by the municipal authorities. She then sued the appellants in the Magistrate's Court for damages for delay and succeeded.

[27] The appellants appealed to the High Court where Abdul Hamid J (as he then was) held:

> The respondents' contention is that not only must the house be completed in the sense that it is fit for human habitation but must also be equipped with a certificate of fitness for occupation. Primarily the court is to determine the meaning that may reasonably be assigned to the word used. In doing so the court should construe it within the four corners of the agreement.
>
> In the light of the various stipulations contained in the agreement I am of the view that it is unreasonable to construe the word in the manner urged upon me by the respondent. This would amount to importing a further term namely, completion on satisfaction endorsed by the City Architect issuing a certificate of fitness for occupation. To do so would in effect, be importing a term which was not within the contemplation of the parties and would have the effect of frustrating the contract.

[28] Mr Shim also referred me to the text book of *The Sale & Purchase of Real Property in Malaysia by Visu Sinnadurai* where the learned author at pp 481–482 states:

> *(h) Delivery of Vacant Possession*
>
> The Housing Developers Act and the Rules made thereunder do not define the term 'delivery of vacant possession'. The Rules and the Regulation merely provide that vacant possession must be within eighteen months under the Rules and twenty-four months under the Regulations.
>
> Clause 19 of the 1982 Regulations provide that upon the issue by the vendor's architect of a certificate certifying that the construction of the said building has been duly completed and when the purchaser has paid all monies due to the vendor under the agreement, including the balance of the purchase price, the vendor shall let the purchaser into possession of the property.
>
> Upon the expiry of fourteen days from the date of the notice from the vendor requesting the purchaser to take possession of the said property, the purchaser is deemed to have taken delivery of vacant possession whether or not the purchaser has actually entered into possession or occupation of the said property.
>
> This latter provision (in Clause 19(2)) would seem to imply that even if the purchaser defaults in making his last progressive payment he is deemed to have taken delivery of vacant possession at the expiry of fourteen days from the date of a notice given to the vendor.
>
> One of the major criticisms leveled against the legislation dealing with housing developers is that on granting vacant possession of the house to the purchaser, the vendor is not under an obligation to ensure that the certificate of fitness to occupy the house has been obtained. In fact, the Regulations expressly state that:
>
> Possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said property until such time as the Certificate of Fitness for Occupation/permit to occupy for the said building is issued.
>
> The effect of such a provision is that the condition relating to completion by the vendor within a stipulated period is diluted as the purchaser is not in a position to occupy the house even though possession has been given to him. In such cases, though the purchaser may have a house which has been completed he may not, for several months be able to occupy the house until a certificate of fitness has been obtained. In fact, in the case of *South East Asia Brickworks Sdn Bhd v Maria Antonette* the High Court on the interpretation of a clause in an agreement between a housing developer and a purchaser refused to imply a term in the contract of sale that the house could only be deemed to have been completed when the certificate of fitness was granted by the relevant authorities. But all the same it was common for developers to insert such a term in the sale and purchase agreement.

[29] Mr Shim also relied on the case *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 where Abdul Kadir Sulaiman, JCA held as follows (at p 139):

It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in clause 5(b) of the agreement which is clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v Harford Fire Insurance Co Ltd AIR* [1965] SC 1288 it was held that:

> to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

FINDINGS OF THE COURT:

[30] Whether the plaintiff succeeds in his claim rests substantially on the interpretation of various clauses in the agreement which have been set out earlier.

[31] What is stated by Abdul Kadir b Sulaiman, JCA in *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* reflects the established principle that a court will generally give the words of the contract their plain and natural meaning even if it leads to an unreasonable result on the assumption that this is what reasonable persons in the position of a contract intended.

[32] However it has also been said that, if giving the words of a contract their ordinary meaning leads to an absurd result, they should be construed so as to avoid the absurdity. On this, it is instructive to look at cases from the Commonwealth. The first case is *Fitzgerald v Masters* [1956] 95 CLR 420 where the facts as summarized by the court were as follows:

> The appellants, the executors of John Martin Fitzgerald deceased, were the unsuccessful defendants in a suit instituted by the present respondent for the purpose of obtaining a decree for the specific performance of an agreement for the sale by the deceased of a one-half interest in a homestead farm situated in the Dubbo district of New South Wales.
>
> The agreement sued upon is in writing and it purports to have been signed by the parties on 5th March 1927. It recites that the deceased was the 'owner of Homestead Farm Number 21/3 Land District of Dubbo of One thousand seven hundred and seventy three acres' and that he had agreed to sell and that the respondent had agreed to purchase 'one half interest of vendor in the said homestead farm' as thereinafter mentioned. Thereafter the document witnessed the agreement of the parties to sell and purchase on the conditions thereinafter set out in Clause 1 provided that the purchase price for the one-half interest should be 850 pounds, payable as to 200 pounds which had already been paid by the respondent to the appellant by way of deposit, and, as to the balance, 'in installments of Ten pounds or more at the option of the purchaser per month the first of such payments of Ten pounds to be made to the vendor by the purchaser on or before

A the first day of April next.' Pursuant to cl 2 the purchaser was to be entitled to possession of the homestead farm equally with the deceased and the former was to be liable for one half of all rents, rates and taxes due or accruing due as from the date of the agreement. He was also to be liable 'for one half the amount of the mortgage moneys due by the said vendor to the Commissioners of the B Government Savings Bank of New South Wales' and also 'for 20 one half of all interest due or accruing due to the said Commissioners' as from the said date. The same clause also provided that the respondent should be responsible for one-half the costs of all improvements or repairs thereafter to be effected on the land. Clause 3 provided that the appellant should transfer to the purchaser the one-half interest C when the respondent 'has paid to the vendor the full amount of the said purchase money of Eight hundred and fifty pounds and provided the purchaser complies with this agreement as regards the other payment as above mentioned for which he is liable'. By cl 4 it was agreed that the sale should be made 'subject to the Minister's consent' and by cl 5 it was provided that the consent of the Minister should be applied for when the respondent 'has paid the full amount of his purchase money'. D Each party bound itself by this clause to do all such acts and sign and produce all such documents as might be necessary to obtain the Minister's consent and to use his best endeavours to obtain that consent. Clause 6 provided that the agreement should be binding upon the executors or administrators of the parties and by cl 7 it was agreed that as from the date of the agreement the respondent, 'provided he E complies with this agreement', should be entitled to a full half interest in all improvements 'now on the said property'. Clause 8, which is the final clause in the agreement and which raises questions of some difficulty, provided that the 'usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by private contract of lands held under the Crown Lands Act F shall so far as they are *inconsistent* herewith be deemed to be embodied herein'. (Emphasis added.)

G **[33]** The appellant raised three grounds before the High Court of Australia but for our purpose one ground only is relevant. That ground concerned the non existence of the 'usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales' and premised on that, the appellants argued that since the parties cannot ascertain the 'usual conditions' there was no effective contract Dixon CJ and Fullagar J rejected the argument by H severing cl 8 from the agreement and in doing so, they, in relation to the construction of cl 8 said:

I There is a superficial difficulty in cl 8, because it purports to incorporate a set of conditions so far as they are inconsistent with what has been specifically agreed upon. No real difficulty, however, is created. Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency. Here it would be indeed absurd to suppose that the parties, having expressed their agreement on a number of special and essential matters, should intend to incorporate by reference terms inconsistent with what they had specially agreed upon. What they must clearly have intended is to

incorporate a set of general conditions except so far as they were inconsistent with what they had specially agreed upon, and cl 8 must be read as if it said 'consistent' or 'not inconsistent' (emphasis added)

[34] McTiernan, Webb and Taylor JJ in the same case had this to say:

It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words (cf *Norton on Deeds*, (2nd Ed, 1928), p 91) .....

It is, we think, abundantly clear that they had no such intention. So far as their minds were directed to matters associated with the sale and purchase of the property they declared the substance of their agreement in unequivocal terms and it would be quite inconsistent with this declaration to read cl 8 literally. There is no doubt in our minds that the only way in which the provisions of that clause can be reconciled with the intention of the parties as disclosed by the agreement is to supply the word 'not' before the word 'inconsistent'.

The clause so read would be in a form not infrequently used by parties to an agreement to supplement express terms and that is what the parties clearly intended. The provision of the word 'not' in such circumstances is by no means foreign to the process of construction (cf *Butler v Wigge* (1667) 1 Wms Saund 65 (n 2) (85 ER74)) (at p 438).

[35] The New South Wales Court of Appeal in *Westpac Banking Corporation v Tanzone Pty Limited & Ors* [2000] NSWCA 25 adopted the principle stated in *Fitzgerald v Masters* and rewrote a rent review clause in a lease to avoid an interpretation which led to an absurd result. The issue before the court was whether the words employed in the lease lead to an absurd result and the court came to the conclusion that they did. The court reaffirmed the principle that even if the words employed lead to unreasonable result, it would not be enough to apply the absurdity rule to rewrite the agreement. The line between what is unreasonable and absurd is of course a fine one.

[36] In England we have the case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd All England Law Reports* [1997] 3 All ER 352, Lord Hoffmann outlines the common sense approach to construing words employed in an agreement as thus:

I propose to begin by examining the way we interpret utterances in everyday life. It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing

so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to 5 fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory'

Mrs Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says 'And how is Mary?' it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer 'Very well, thank you' without drawing attention to his mistake. The message has been unambiguously received and understood.

If one applies that kind of interpretation to the notice in this case, there will also be no ambiguity. The reasonable recipient will see that in purporting to terminate pursuant to cl 7(13) but naming 12 January 1995 as the day upon which he will do so, the tenant has made a mistake. He will reject as too improbable the possibility that the tenant meant that unless he could terminate on 12 January, he did not want to terminate at all. He will therefore understand the notice to mean that the tenant wants to terminate on the date on which, in accordance with cl 7(13), he may do so, ie 13 January (p 375) .....

In the case of commercial contracts, the restriction on the use of background has been quietly dropped. There are certain special kinds of evidence, such as previous negotiations and express declarations of intent, which for practical reasons which it is unnecessary to analyse, are inadmissible in aid of construction. They can be used only in an action for rectification. But apart from these exceptions, commercial contracts are construed in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention: (see *Prenn v Simmonds* [1971] 3 All ER 237) at p 239. The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey. Why, therefore, should the rules for the construction of notices be different from those for the construction of contracts? There seems to me no answer to this question. All that can be said is that the rules for the construction of notices, like those for the construction of wills, have not yet caught up with the move to common sense interpretation of contracts which is marked by the speeches of Lord Wilberforce in *Prenn v Simmonds and Reardon Smith Line Ltd v Hansen-Tangen*, *Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, (HL) *Mannai Investment v Eagle Star* (Lord Hoffmann) 381

1 WLR 989. The question is therefore whether there is any reason not to bring the rules for notices up to date by overruling the old cases. There can, I think, be no question of anyone having acted in reliance on the principle of construction used in Hankey v Clavering. The consequence of such a construction is only to allow one party to take an unmeritorious advantage of another's verbal error, an adventitious bonus upon which no one could have relied. In this respect, the case for rejecting the old authorities is at least as strong as it was in *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1; [1983] 1 AC 444, in which this House overruled cases going back to the early nineteenth century on the construction of contracts for sale at a valuation.

[37] The above approach was followed by the Court of Appeal in *Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 where Gopal Sri Ram JCA discussed the modem approach to construction of documents and this is what he said:

We begin by recognizing that there are no rules of construction. It is true that at one point in time courts did refer to the principles they applied when interpreting bilateral documents as being 'rules'. But the modern approach is different. It is set out in *Chitty on Contracts 928th Ed Vol* p 604, para 12-045:

Certain rules of construction have been formulated by the courts. Previously, these rules were applied somewhat rigidly and adhered to tenaciously (even though the application one rule in preference to another might lead to an opposite result). However, it was pointed out that the modern approach to construction is 'to assimilate the way in which (contractual) documents are interpreted by judges to the commonsense principles by which any serious utterance would be interpreted in ordinary life. As a result, most rules of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the parties' intentions, though subject to examination of the relevant circumstances surrounding the transaction. Some rules, on the other hand, such as the contra proferentem rule, are of a different nature in that they are less obviously designed to ascertain the intentions of the parties and are more closely assimilated to 'rules' in the traditional sense.'

That it is the objective aim and purpose of the transaction which is critical was recognized by Lord Diplock in *Antaios Compania Noviera SA v Salen Rederierna AB* [1985] 1 AC 191, where he said, p 201, para Dl:

While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of the statutes to the interpretation of the private contracts, I agree with the passage I have cited from the arbitratorsy award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense. In *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, Steyn LJ (as he then was) said this, p 27: '... in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men.

A

> And in the present case that means that the yardstick is the reasonable expectations of sensible businessman. We accept that the foregoing comment was made in the context of contract formation. But in our judgment the principle applies with equalforce to contract interpretation.'

B

[38] With the emergence of standard form contracts as in this case, Lord Denning in *John Lee and Son (Graham) Ltd v Railway Executives* [1949] 2 All ER 581 expressed the view that an unreasonable onerous term in a standard contract would not be enforced by the courts, for 'there is a vigilance
C of common law which, while allowing the freedom of contract, watches to see that it is not abused'

[39] Another rule of construction is the doctrine of fundamental breach where the courts had not allowed the operation of an exemption clause if it
D meant the defaulting party is exempted from responsibility for a fundamental breach. This is how *Lord Denning in Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936:

> Notwithstanding earlier cases which might suggest the contrary, it is now settled
E that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct of indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.

F

[40] I now apply the above principles to the factual matrix to the present case. Before I do that, I should first set out the effects of clauses 21.1 to 21.3 of the agreement which are these. The plaintiff is required to pay the entire full purchase price before he can get vacant possession of the property. On the
G face of it, this is a reasonable term. However vacant possession is defined as not including the connection of water and electricity supply to the property. Nor does it mean that the plaintiff can take physical possession of the property until such time that the certificate of fitness is issued by the appropriate authorities. In short, what it means that the plaintiff is obliged to
H fulfill his obligation by paying the entire purchase price without the reciprocal obligation on the part of the defendant in delivering vacant possession of the property. Not only that there is no timeline in which the defendant is required to connect the water and electricity supply to the property, there is also no timeline set out in the agreement for the defendant to obtain the
I certificate of fitness from the appropriate authorities for the property.

[41] The issue which confronts me is whether the literal interpretation of clauses 21.1 to 21.3 of the agreement is such that it dictates this court's intervention. In dealing with this issue, I am fully mindful of the dictum that

the court's duty is to interpret the clauses in their natural meaning. That said, the court has a constitutional duty to ensure that the dominant party in a standard form agreement is not to abuse its position to the detriment of the weaker party bearing in mind we in Malaysia do not have as in England the Fair Trading Act 1977 or as in Australia the Trade Practices Act. Reverting back to clauses 21.1–21.3 of the agreement, there cannot be any argument that they are unreasonable terms but that is not enough for the court to intervene. I, then posed the next question. Are they absurd terms? My answer is in the affirmative and my reasons are these. Firstly, by not being able to obtain physical possession of the property with all the usual amenities after the full payment of the purchase price do not make any business sense. Secondly, the delivery of the property with its full benefits of water and electricity supply and a certificate of fitness from the appropriate authority after the full payment of the purchase price in my view is a fundamental term of the sale and purchase agreement. It goes to the root of the contract. And to exempt the defendant from complying with this fundamental term contradicts 'objective aim and purpose of the transaction', (see Lord Diplock in *Antaios Compania Noviera SA v Salen Rederierna AB*). Thirdly, the plaintiff is put in a position where he could not enjoy the full benefit of the property like renting it out and yet is saddled with the financial burden of servicing his loan repayment with the financial company. Fourthly, public policy of ensuring that ordinary consumers are not burdened with such unconscionable terms in standard form contracts requires the court to be vigilant and this is one instance where the court should intervene. Fifthly, clauses 21.1–21.3 and 22 of the agreement do not provide for any definite time frame for the defendants to obtain the water and electricity connection and certificate of fitness which is one of my considerations for my conclusion. The use of the phrase of 'using its best endeavours' in clause 22 of the agreement does not help the defendant and in fact provides seeds for arguments.

[42] Accordingly clauses 21.1–21.3 of the agreement are amended as follows:

21. Delivery of vacant possession:

Subject to any extension or extensions of time as may be allowed by the Superintendent Officer and PROVIDED THAT the purchaser shall have paid to the vendor all installments of the purchase price and any other sums under this agreement as and when due and payable the said Property without any alterations and/or additions to the said Building as stipulated under Clause 13 hereof shall be ready for delivery of vacant possession of the purchaser within thirty (30) months from the date hereof. In the event that the vendor shall delay completion of the said Building and delivery of vacant possession of the said Property to the purchaser beyond the aforesaid period the vendor shall pay to the purchaser agreed damages calculated from day to day at the rate of twelve (12%) per annum on the

purchase price of the said Property from such vacant possession of the said Property until the delivery of vacant possession of the same to the purchaser.

Vacant possession to the said Property shall mean the issuance of the Certificate of Fitness for Occupation by the Appropriate Authorities.

22. Certificate of fitness for Occupation:

The vendor shall within the 30 months as prescribed in clause procure the issuance of the Certificate of Fitness for Occupation in respect of the said Property and shall at its own cost and expense comply with all the requirements of the Appropriate Authorities which shall be conditions precedent to the issuance of the Certificate of Fitness for Occupation and hereby undertakes to produce such certificate to the purchaser when issued. For the purposes of this agreement the expression 'Certificate of Fitness for Occupation' shall mean a certificate of fitness for occupation of the said Building issued by the Appropriate Authorities and shall include a temporary certificate of fitness for occupation for the Appropriate Authorities.

PROVIDED THAT the issuance of a temporary certificate of fitness for occupation shall not discharge the vendor from its obligation to obtain a final certificate of fitness for occupation for the said Property. The vendor by its servants and/or agents shall be entitled at any time after the purchaser has been let into possession of the said Property and prior to the issuance of the said Certificate of Fitness for Occupation to make any alterations and/or addition to the said Building as may be required by the Appropriate Authorities and the purchaser shall allow them access into the said Property at all reasonable times for such purposes. All other notices [if any] of the Appropriate Authorities served before the date of issuance of the Certificate of Fitness for Occupation shall be complied with by the vendor PROVIDED the same do not relate to any alterations, additions or otherwise made by the purchaser in contravention of Clause 11 hereto in which case and in the case of any notice after the issuance of the Certificate of Fitness for Occupation shall be complied with by and at the expense of the purchaser.

[43] In the circumstances, I award the sum of RM23,878.35 being 12% per annum on the purchase price of RM270,000.00 from 1 October 1999 to 26 June 2000. I am aware of the fact that the plaintiff had only claimed for interests from 1 April 2000. Be that as it may in the interest of justice, I award interests to run from 1 October 1999 which is the appropriate date.

[44] However this amount must be offset against the sum of RM30,690.76 which sum is due from the plaintiff to the defendants. It should be noted the calculations of the two amounts were done and agreed to by the counsels in encl 133.

[45] Before I conclude, let me say I am fully mindful of the fact that the plaintiff here is a qualified solicitor. In my view, that is of no relevance in the

case of a standard agreement. He had no choice but to accept the terms like other purchasers of the defendants' shophouses. The use of standard agreements in this day and age had eroded the basic principle of freedom of contract and in my view the court is duty bound to be vigilant to ensure that consumers are not being burdened with unconscionable terms.

Plaintiff's claim for damages allowed.

Reported by Brendan Navin Siva